78-1884

Supreme Court, U. S.
FILED
MAR 30 1979
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

No. A-548, October Term, 1978.

Sidney S. Lerner, M.D., Administrator
Estate of Samuel Lerner, Deceased

*Petitioner*

V.

Gerald J. Haas, Esquire, and
Philadelphia Psychiatric Center, and
Pennsylvania Manufacturers' Association
Insurance Company

*Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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## INDEX


| | |
|---|---|
| Petition | 1 |
| Orders, Opinions and Decision Below | 2 |
| Jurisdiction | 3 |
| Question Presented For Review | 3 |
| Constitutional Provision Involved | 3 |
| Statement Of The Case | 4 |
| Reasons For Granting The Writ | 5 |
| Conclusion | 12 |


## INDEX TO APPENDIX


| | |
|---|---|
| Orders by Supreme Court of Pennsylvania denying allowance of appeal, September 14, 1978 | A1 |
| Denial of Reconsideration November 2, 1978 | A1 |
| Precedential Opinion in Richman denying counsel fee even if earned because barred by failure to satisfy requirements of controlling statutes of workmen's compensation law | A2 |
| Squarely conflicting Opinion in Lerner awarding counsel fee where Court can point to no feature distinguishing the cases with regard to application of controlling statutes | A6 |
| Board's Opinion at A69972 documenting absence of approval of Agreement For Legal Services after tolling of timely appeal period | A10, A14 |
| Board's one sentence Order at C.F. 2384 awarding counsel fee sans findings of fact, conclusions of law or supporting memorandum | A15 |

## TABLE OF AUTHORITIES

Cases:

Sherred v. Pittsburgh, 7 Pa Cmwlth 401, 299 A.2d 381 (1973)
Richman v. W.C.A.B. et al, 16 Pa Cmwlth 594, 329 A.2d 920 (1975)
Lerner v. Haas et al, 35 Pa Cmwlth 300, 386 A.2d 1038 (1978)

Constitutional Provisions:

United States Constitution
Amendment XIV

Pennsylvania Statutes:

Pa. Workmen's Compensation Act, Sections 318, 407, 423, 442, 501

Authorities

Barbieri, Pa. Work. Comp., Chapter 5, Section 5.45 at page 157

IN THE

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Sidney S. Lerner, M.D., Administrator
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v.

Gerald J. Haas, Esquire, and
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Pennsylvania Manufacturers'
Association Insurance Company
Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

The petitioner Sidney S. Lerner, M.D., administrator of the estate of Samuel Lerner, deceased, respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in this proceeding on September 14, 1978; together with a summary vacation of the Order below.

## ORDERS, OPINIONS and DECISION BELOW

Supreme Court of Pennsylvania:

An Order denying Pettition for Allowance of Appeal from this Commonwealth Court and an Order denying on the merits an amended petition were both entered by the Supreme Court of Pennsylvania on September 14, 1978; see A1.

Denial of reconsideration was entered on November 2, 1978; see A1

Commonwealth Court of Pennsylvania

Richman v. W.C.A.B. et al., 16 Pa. Cmwlth 594, 329 A. 2d 920 (1975); see A2

Sherred v., Pittsburgh, 7 Pa. Cmwlth 401, 299 A.2d 381 (1973)

Lerner v. Haas et al., 35 Pa. Cmwlth 300, 386 A. 2d 1038 (1978); see A6

Pa. Workmen's Compensation Appeal Board:

Lerner v. Phila. Psychiatric Center at A69972 entered on October 2, 1975; see A14.

Opinion in Lerner v. Phila. Psychatric Center at (Counsel Fee)c.f.2384 entered officially but as an unpublished document on September 1, 1976.

Order in Lerner v. Phila. Psychiatric Center at (Counsel Fee)C.F.2384 entered on November 5, 1976; unpublished copy appended at A15 .

Referee Wallace J. Stevenson:

Decision in Lerner v. Phila. Psychatric Center and Pennsylvania Manufacturers' Association Insurance Company at No. 197-18-4933 issued on March 5, 1975.

## JURISDICTION

An Order denying Petition for Allowance of Appeal from the Commonwealth Court and an Order denying on the merits an amended petition were both entered by the Supreme Court of Pennsylvania on September 14, 1978. A final Denial of Reconsideration was entered on November 2, 1978. On February 8, 1979 Mr. Justice Brennan issued an Order extending the time for filing a Petition for Writ of Certiorari in this case to and including April 2, 1979, for good cause but without prejudice to the Court's consideration of whether the petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

## QUESTION PRESENTED FOR REVIEW

If a State appellate court makes the grave procedural error of reviewing an Order that is devoid of findings of fact or conclusions of law, and compounds that lapse by entering an Opinion that is in square conflict with its very own precedential Decision, does this not speak against a fair hearing and deny the due process and equal protection of the laws guaranteed by our Constitution?

## CONSTITUTIONAL PROVISION INVOLVED

"... nor shall any State deprive any person of ... property, without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws."

## STATEMENT OF THE CASE

Petitioner seeks review of a cause wherein the Pennsylvania Workmen's Compensation Appeal Board (Board) has entered an Order devoid of findings of fact or conclusions of law that directs payment (from a compensation award) of counsel fee plus interest. The pervasive pattern of errors to be specified below involves the failure to apply relevant statutes as well as square conflict in the Opinions of its Appellate Courts that has negated a fair hearing and thereby resulted in a denial of due process and equal protection of the laws that are so repugnant to our Constitution.

This cause is not narrowly limited to the needs of petitioner. For the public interest is served when workers' compensation litigation, of vital importance to all working people, is conducted in a judicial atmosphere where the laws are impartially administered and a fair hearing is assured. In 1976, the most recent year for which figures are available in Pennsylvania, more than fifteen hundred compensation awards were made with an average award of sixteen hundred dollars ($1600). A mere handful of claimants could afford to avail themselves of legal counsel. A less-than-fair hearing in such circumstances creates a crisis of confidence in our judicial system and deepens the perception of our courts as favoring the rich and powerful.

This is such a cause. A petitioner, unrepresented by counsel, prays for an equitable review of an Order devoid of findings of fact or conclusions of law which an appellate body erroneously undertook to scrutinize, substituting its own judgments as a fact-finder, and then entered an Opinion that conflicts squarely with its own precedential Decision on the issue of counsel fee in workers' compensation cases. Such a course and result preclude a fair hearing and deny the workers of our land of the hard-won rights of the Fourteenth Amendment. Can the Supreme Court disdain to lend a helping hand to the under-dog and right this wrong against the American worker?

This Court's jurisdiction is invoked, sua sponte if need be, to resolve the egregious conflict and in the words of John Rutledge of South Carolina, "to secure the national rights and uniformity of Judgmts."

## REASONS FOR GRANTING THE WRIT

A pervasive pattern of improprieties and squarely conflicting decisions has deprived petitioner of a fair and impartial hearing. The arbitrary and capricious result flies in the face of documentary evidence of record and bespeaks a denial of due process and equal protection of the laws which is repugnant to our Constitution. The Court's review is sought in a matter of vital importance to all working people in order to resolve egregious conflicts and to secure the uniformity of precepts appropriate to a society governed by laws not men. These conflicts are:

1. Exemption of compensation benefits from claims. Section 318 of the Pennsylvania Workmen's Compensation Act (Act) exempts compensation payments from claims. In Barbieri, an authority on workers' compensation in Pennsylvania, it is said: "Section 318 ... includes the exemption clause which frees compensation payments from claims of creditors and makes assignments of such payments illegal. The exemption may not be waived." The Board's Order in Lerner is written without regard to that statute. See:

Pennsylvania Workmen's Compensation Act, Section 318.

Barbieri, Pa. work. comp., Chapter 5, Section 5.45 at page 157.

Order by Board here appended at page A15.

2. Exception For Counsel Fee. Section 501 of the Act provides an exception whereby attorneys after having fulfilled specific requirements may obtain a lien against prospective compensation payments by employer/insurer to the employee. The record shows that the respondent lawyer in Lerner did not fulfill said requirements and further , that the Board ordered payment from already expended funds by the employee's estate to the attorney. Section 501 authorizes only a lien against prospective payments by employer to employee. See: Section 501 of the Act.
Order by Board here appended at page A15.

3. Findings of fact, Conclusions of law in Sherred. In Sherred the Court protected the interest of Mary Alice Sherred by remanding the case to the Board to supply the specific findings of fact and conclusions of law that might enable the appellate Court to give "fair judicial scrutiny" to the matter. In Lerner, however, the Court denied the equal protection of the laws by proceeding to hear this case even though the Board had issued its Order sans findings of fact and conclusions of law. Due process was also denied in Lerner since, by its own words in Sherred, the appellate Court could not give "fair judicial scrutiny" in such circumstances. Sherred v. Pittsburgh, 7 Pa Cmwlth 401, 299 A2d 381, (1973) Lerner v. Haas et al, 35 Pa Cmwlth 300, 386 A2d 1038, (1978)
See the unpublished one-sentence Order entered by the Board in Lerner v. Phila. Psychiatric Ctr., at C.F. 2384, here appended at page A15.

4. Denial of award of counsel fee in Richman. In Richman the Court held:

"... that appellant did not comply with the statutory provisions that would enable him to collect the fees they are claiming either from the claimant, from the subrogees or as a lien on the fund." (underlining supplied)

The Opinion concluded:

"Surely equity, and perhaps the law, would allow appellant to be paid a reasonable attorney fee in a case such as presented here, absent a controlling statute. However, when, as in this case, there are attorney fees claimed for protection of subrogation interests, such claims must be presented in accordance with Section 501 or Section 442 of the Workmen's Compensation Act for approval by the referee or the Board. Since neither procedure was followed in the instant case, we, therefore, must affirm the Board's decision and deny appellant's petition and appeal." See: Richman v. WCAB et al, 16 Pa. Cmwlth 594, 329 A2d 920 (1975) here appended at page A2

In Lerner, however, the Court affirmed award of counsel fee although the attorney "did not comply with the statutory provisions that would enable him to collect the fees" nor can the Court point to any feature that distinguishes the cases with respect to the applicability of the controlling statutes. The statutory requirements are:

(a) Prior Board approval of Agreement for Legal Services conforming to Section 442.

(b) Petition For Counsel Fee Under 501 is in the nature of an appeal from Referee's award and by statute must be filed within twenty days. See: Lerner v. Haas et al, 35 Pa Cmwlth 300, 386 A2d 1038 (1978)

Attorney Haas has made no showing nor is there evidence of record that prior approval of Agreement

For Legal Services was granted or even applied for. Contrariwise, the absence of such approval is documented in an appeal filed by claimant before the Board at A69972 in which the award of counsel fee was one of the issues raised. In the Opinion, the Board concluded:

"Further, section 501 of the Pennsylvania Workmen's Compensation Act ... negates the validity of any counsel fee arrangement unless such an arrangement is approved by this board. Since there is no such approval in this case, the petition for allowance of attorney fees and disbursements must be dismissed." (underlining supplied) See: Pennsylvania Workmen's Compensation Appeal Board in Lerner v. Phila. Psychiatric Ctr at Appeal A69972 unpublished Opinion here appended at page A10, and its conclusion at page A14. That decision not only documents the absence of approval necessary to validate a claim for counsel fee but by its date of October 2, 1975 clearly indicates that the timely filing of an appeal within twenty days of the award by Referee on March 5, 1975, had long since tolled.

5. Quantum meruit award in Sundheim.

The Respondent, Attorney Haas, entered a Petition For Counsel Fee Under Section 501 with the Board and sought by a back-door approach to insinuate an alternative quantum meruit claim. There is no provision for such claim in Section 501. The Court cluded its Opinion in Sundheim by stating:

"The plaintiff, in our judgment, was not entitled to recover on his contract, the basis of this suit, but he may have an action on quantum meruit for damages as a result of a breach of contract." The Petitioner here holds while an award under

Section 501 was clearly improper, that might not preclude "an action on quantum meruit for damages as a result of a breach of contract." To sustain such an action, however, the attorney must demonstate that he seeks the amount deserved coinciding with the amount by which the estate benefitted as a result of the attorney's efforts. The record shows clearly, however, that the estate gained no benefit at all through Mr. Haas. The award by the Referee states:

" Based on a careful consideration of this testimony (totalling 397 pages) and the exhibits, the Referee hereby makes the following Findings of Fact, Conclusions of Law and Order, applicable to all three petitions:- "

Attorney Haas had withdrawn himself from the case long before the hearings at which that testimony and the exhibits were presented and he did not participate or contribute to them in any way. The attorney did himself state in a letter to petitioner dated April 25,1974:

"... my forbearance to insist on payment at this time should not be in any way construed as my considering the fee to be a contingent upon the successful conclusion of the case."

It is thus clear that Mr. Haas considered himself entitled to a counsel fee based on $5000 without regard to any beneficial award, based solely on petitioner's telephoned assent to a figure of $4800 as a basis for negotiation. Mr. Haas did not examine or prepare any witnesses. He appeared at no evidentiary hearings. Nor did he ever once meet to talk with the claimant. With no supporting documents, we are asked to believe that that this expert spent 20 hours negotiating with the insurer at the implausible rate of $73 per hour. Mr. Haas

seeks the best of both worlds but he has no equitable claim either under Section 501 or by a quantum meruit award. As to which was the basis for the award, the Court can only speculate since the Board entered its Order sans findings of fact or conclusions of law. See:
Sundheim v. Beaver County Building & Loan Assoc. 140 Pa. Super 529, 14 A2d 349 (1940)
See the unpublished one-sentence Order entered by the Board in Lerner v. Phila. Psychiatric Ctr., at C.F. 2384, here appended at page A15.

6. The levy of interest in Palmgreen

By the 1972 amendments to the Workmen's Compensation Act, the General Assembly of Pennsylvania sought to assure "the prompt payment of compensation when due." To discourage the endemic delay, an interest rate of 10% was instituted on payments due. That provision applies to compensation payments from employer/insurer to employee. A levy of interest on counsel fee to be paid by a disabled employee is nowhere specified or contemplated. The Commonwealth Court's Opinion in Lerner relying on Palmgreen states:

"In all cases of contract interest is allowable at the legal rate from the time payment was withheld after it became the duty of the debtor to make payment. Palmgreen v. Palmer's Garage, Inc., 383 Pa. 105, 117 A2d 721 (1955)." In relying on Palmgreen the Court has chosen a case in the general domain of law without any reference at all to workers' disability compensation. It is inconceivable that the Legislature which strictly regulates the counsel fee that may be assessed against a disabled worker would countenance a levy of interest on that fee. The levy assessed here is with-

out precedent and has no basis in law or equity. Palmgreen, however, does serve to raise the issue of when it "became the duty of the debtor to make payment." In its Opinion in Lerner, the Commonwealth Court stated on the first page:

" On November 14, 1972 respondent (Haas) and the employer's insurance company agreed to a stipulation of facts and a proposed payment of $4800. The petitioner (Lerner) orally agreed to accept the agreement that same day and the following day the agreement was presented to the referee." Section 407 of the Act requires that all agreements for compensation be in writing and signed by all parties in interest. The "document" variously called above a "stipulation of facts" and an "agreement" supposedly executed by Haas and the insurer and to which Lerner orally agreed (by telephone) and said to have been presented to the referee on the following day was presumably a bona fide document (in writing). Such, however, is not the case. No Agreement bearing either a $4800 or a $5000 figure was ever presented to the referee. No such document has been offered in evidence nor does it appear of record.The Board's Order levies interest from January 1, 1973 when, presumably it "became the duty of the debtor to make payment." Unfortunately for this concocted version, the insurer wrote Mr. Haas on March 1, 1973, saying:

"Re: Samuel Lerner v Phila. Psychiatric Hosp.
Termination Petition #197-18-4933

Dear Mr. Haas:

"With reference to the above-captioned case, youwill recall I previously wrote to you by letter of January 5, 1973 requesting copies of medical bills and your contention as to the disability time involved in this case so that

the Stipulation can be worked out and drawn up.

"The Referee's office is awaiting the Stipulation, can you please advise me of these matters so that the Stipulation can be prepared.

Very truly yours,

( signed )

John F. McElvenny

JFM:chy

c.c. - Referee Wallace J. Stevenson"

To this Mr. Haas appended a hand-written note:

" 3-2-73

"Dear Sid -

For your information & action. May I hear from you soon?

( signed ) Jerry"

It is incredible that despite the inchoate state of any agreement or stipulation of facts let alone an award or payment as of March 1, 1973 yet the levy of interest dates from January 1, 1973 when it purportedly "became the duty of the debtor to make payment." This strange set of circumstances took place when the Board chose to make an award while abstaining from submission of findings of fact or conclusions of law that might reasonably reflect the evidence of record. This lapse was compounded by the appellate Court's proceeding contrary to Sherred and assuming the role of advocate in a vain effort to justify the capricious result.

## CONCLUSION

The essence of civil liberty requires a legal remedy for a legal wrong. Since our government is one of laws not men, the rights and safeguards established by the workmen's compensation laws

should be impartially administered for the protection of all disabled workers.

WHEREFORE, petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania, and a summary vacation of the Order below.

CERTIFICATE OF SERVICE

I certify that three copies of this document have been mailed to each of the below-named and that all who should be served have been served.

Gerald J. Haas, Esq., 225 S. 15th Street,
Philadelphia, Pa. 19102

Larry Pitt, Esquire, 925 Chestnut Street
Philadelphia, Pa. 19107

Sidney S. Lerner, M.D.

Sidney S. Lerner, M.D.
Pro se for Petitioner
1101 Stratford Avenue
Philadelphia, Pa. 19126

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

September 18, 1978

In re: Lerner v. Haas et al, No. 3636 A.D. 1978

Dear Dr. Lerner:

Please be advised that the Court has entered the following Orders in the above captioned matter:

On the Petition for Allowance of Appeal from the Commonwealth Court:

"September 14, 1978 Denied By the Court"

On the Amended Petition for Allowance of Appeal:

"September 14, 1978 Denied on the merits By the Court"

Very truly yours,
Sally Mrvos, Prothonotary

November 2, 1978

RE: Lerner v Haas et al, No. 3636 A.D. 1978

Dear Dr. Lerner:

The Court has decided not to reconsider its denial of allocatur in the above case. This ends the matter.

If further advice is needed, please seek it from legal counsel of your choice.

Sincerely,
Michael J. Eagen
Chief Justice

In The COMMONWEALTH COURT of PENNSYLVANIA
Richman et al v WCAB et al at No. 182 C.D. 1974
Opinion by Judge Wilkinson, January 7, 1975

The facts of this case are essentially undisputed. The appellant is the law partnership of Greenlee, Richman, Derrico & Posa. This firm had been retained by Lloyd E. Myers, claimant , to represent him in a workmen's compensation claim against appellee United States Steel Corporation.

Claimant had been injured on April 2, 1971. Appellee corporation denied that a compensable accident had taken place, but in lieu of workmen's compensation, had paid claimant sickness and accident benefits during the period of his disability. Also during this period, the claimant received unemployment compensation benefits from the other appellee, the Pennsylvania Bureau of Employment Security.

On October 19, 1972, the parties were notified by the referee that claimant had proven a compensable accident did occur and claimant, therefore, was entitled to workmen's compensation benefits from appellee corporation, a self-insurer, in the amount of $3437.15. The referee's order further established that subrogation rights were granted to both appellee corporation and appellee bureau for all payments of social insurance benefits ($2340) and unemployment compensation benefits ($900) that had been paid to claimant. There was no appeal from any part of this order.

On November 20, 1972, appellee corporation mailed appellant a check for $197.15 as the balance due to claimant after deduction of the two subrogation claims of the appellees. Appellant then, on March 16, 1973, submitted invoices to both appellees for their respective pro-rata share of appellant's charges for legal services and costs advan-

ced in prosecuting claimant's case. Both appellees refused to honor appellant's bill and on April 12, 1973, almost six months after the referee's award, appellant filed a "Petition for Award of Counsel Fees" with the Workmen's Compensation Board, requesting that the Board order payment of appellant's expenses and legal fees properly due from each subrogee.

The Board denied appellant's petition, holding that the request for counsel fees is in the nature of an appeal from the referee's award and under Section 423 of the Pennsylvania Workmen's Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. Sections 853, 854 (Supp. 1974-1975), the appeal was too late, having been filed beyond 20 days of the notice of the referee's award. The Board also held that because the provisions of Section 501 of the Act, 77 P.S. Section 1021, were not met, "this Board has no authority to direct the parties to make payments to counsel for claimant". The instant appeal followed.

The appellant now argues, based on the equitable principles of subrogation as laid down in Furia v. Philadelphia, 180 Pa. Superior Ct. 50, 118 A. 2d 236 (1955), and the intent evidenced in the legislative history of Section 319 of the Act, 77 P.S. Section 671, that they are entitled to receive attorney fees from the fund they created which benefitted the subrogees. We find it unnecessary to reach this issue for we hold that appellant did not comply with the statutory provisions that would enable him to collect the fees they are claiming, either from the claimant, from the subrogee or as a lien on the fund.

Appellant's right to receive his attorney fees from the subrogees of a workmen's compensation award must be controlled by the Workmen's Compen-

sation Act. Section 501 of the Act, 77 P.S. Section 1021, provides that, inter alia:

"....

"No claim or agreement for legal services or disbursements in support of any claim for compensation, or in preparing any agreement for compensation ... shall be an enforceable lien against the amount to be paid as compensation, or be valid or binding in any other respect, unless the same be approved by the board....": (Emphasis supplied.) [1] The section goes on to require that such claim or agreement be filed with the department for approval, and then provides for creation of a lien by giving notice to the employer.[2] Appellant, who has the burden of proof, has made no showing that the approval of attorney's fees contemplated in Section 501 was ever granted or even sought.

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[1] Section 442 of the Act, 77 P.S. Section 998, was added on February 8, 1972, long after the injury on April 2, 1971, but before the referee's determination on October 19, 1972. This Section provides:

"All counsel fees, agreed upon by claimant and his attorneys, for services performed in matters before any referee or the board, whether or not allowed as part of a judgment, shall be approved by the referee or board as the case may be, providing the counsel fees do not exceed twenty per cent of the amount awarded. The official conducting any hearing, upon cause shown, may allow a reasonable attorney fee exceeding twenty per centum of the amount awarded at the discretion of the hearing official.

"In cases where the efforts of claimants' counsel to produce a result favorable to the claimant but where no immediate award of compensation is made such as in cases of termination or suspen-

Surely equity, and perhaps the law, would allow appellant to be paid a reasonable attorney fee in a case such as presented here, absent a controlling statute. However, when as in this case, there are attorney fees claimed for protection of subrogation interests, such claims must be presented in accordance with Section 501 or Section 442 of the Workmen's Compensation Act for approval by the referee or the Board. Since neither procedure was followed in the instant case, we, therefore, must affirm the Board's decision and deny appellant's petition and appeal.

Accordingly, we enter the following

ORDER

NOW, January 7, 1975, the decision of the Workmen's Compensation Appeal Board is hereby affirmed.

(signed) _____

Roy Wilkinson, Jr., Judge

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sion the hearing official shall allow or award reasonable counsel fees, as agreed upon by claimant and his attorneys, without regard to any per centum." Since appellant did not comply with either provision, i.e., approval of the referee or board, whether this Section applies is immaterial.

[2] It should be noted that the Board's opinion states appellant failed to comply with the notice provision of this third paragraph of Section 501. At argument, appellant produced a letter he sent to U.S. Steel on November 8, 1972, and strenuously contends that this letter was sufficient notice to comply with this paragraph. In addition to the letter not being on the record, we need not decide if this argument is meritorious, since we hold that appellant failed to comply with the other portions of the section.

In The COMMONWEALTH COURT of PENNSYLVANIA
Lerner v Haas et al at No. 2109 C.D. 1976
Opinion by Judge Wilkinson, May 16, 1978

This case, an appeal of an order of the Workmen's Compensation Appeal Board (Board) awarding counsel fees to respondent, arises out of workmen's compensation proceedings wherein the employer sought to terminate benefits to Samuel Lerner' ( claimant ).

Respondent, an attorney, was hired by claimant to represent him at these proceedings on September 26, 1971; claimant died on December 21. 1971. Respondent continued to represent the estate (of which petitioner, the brother of the claimant, was appointed administrator) in the workmen's compensation action. On November 14, 1972 respondent and the employer's insurance company agreed to a stipulation of facts and a proposed payment of $4800. The petitioner orally agreed to accept the agreement that same day and the following day the agreement was presented to the referee. However, when the written agreement (with the amount of payment increased to $5,000) was presented to petitioner for his signature he delayed signing it for a period of five months. Finally on April 19, 1973 petitioner informed respondent that he would not sign the agreement and instead requested the respondent to secure an agreement from the insurance company to pay an additional $160 for certain medical bills. Respondent refused to seek this additional sum and withdrew from the case. Hearings were held with the petitioner appearing pro se and following a series of appeals an award was made of $6,271.10 representing compensation of $4911.43 and the balance in interest. Respondent filed a petition with the Department of Labor and Industry asking for payment for approxi-

mately 20 hours of legal work on the claim. This petition was granted by the Board in the amount of $1,460 plus interest at the rate of 6 per cent per annum from January 1, 1973 until the date of payment. From this award petitioner appeals.

Petitioner throughout has regrettably misread The Workmen's Compensation Act[1] which makes it difficult for us to sift the wheat from the chaff in determining and properly disposing of the issues he has raised. As we apprehend the matter, the only real issue in this case is whether the Board had the authority under Section 501 of the Act, 77 P.S. Section 1021, to approve the fee.

Petitioner first argues that this award was improper because there was no prior approval of the agreement between claimant and counsel by the Board or referee. He relies on a decision of the Board dated October 2, 1975 which dismissed the respondent's petition on the ground there had been no prior approval of counsel fees. However, that decision did nothing more than state the proper procedure under Section 501 required respondent to file his claim with the Department of Labor and Industry (which was subsequently done). See Richman v. Workmen's Compensation Appeal Board 16 Pa. Commonwealth Ct. 594, 329 A2d 920(1973).

Alternatively, Petitioner argues that the respondent, having breached his contract by withdrawing from the case, should not be permitted to share in the award of compensation made after his withdrawal. This argument, however, misstates allegations in respondent's petition which were not denied by petitioner, and the legal basis to support respondent's award of counsel fees. These factual allegations show that respondent had negotiated and petitioner had agreed to a settlement on November 14, 1972 and that respondent's petition

for counsel fee was based on the amount of work actually performed by respondent on behalf of his client up to January 1, 1973. While petitioner could and in fact did repudiate his initial agreement to the settlement, he could not by so doing deprive counsel of a reasonable fee for the amount of services he did perform. See Sundheim v. Beaver County Building & Loan Association, 140 Pa. Superior Ct. 529, 14 A2d 349(1940) (allocatur refused). For this reason we also find petitioner's assertioner that Section 442 of the Act, added by the Act of February 8, 1972, P.L. 25, as amended, 77 P.S. Section 998[2], precludes this award to be without merit since that section gives the Board the authority to award counsel fees exceeding the statutory amount "upon cause shown".

Similarly we are not persuaded by petitioner's assertion that the Board is without authority under Section 501 to award counsel fee plus interest in the proper case. Moreover, we believe, sufficient facts are in the record, undisputed by petitioner to conclude the award of interest in this case was "reasonable" and thus, properly made by the Board. See Workmen's Compensation Appeal Board v. Leuchen, 21 Pa. Commonwealth Ct. 39, 342 A.2d 810 (1975). The record showed the agreement had been prepared and agreed to by petitioner consisting of a $4,800 settlement and attorney's fees of $1,393 which was subsequently increased to $1,460 based on the increase in the settlement to $5,000. In all cases of contract interest is allowable at the legal rate from the time payment was withheld after it became the duty of the debtor to make payment. Palmgreen v. Palmer's Garage, Inc. 383 Pa. 105, 117 A.2d 721 (1955). There was ample evidence for the Board to have concluded the repudiation of the agreed settlement was unreasonable

and unwarranted. Petitioner has advanced no reason for rejecting the stipulation other than his desire to have additional compensation for $160 for medical bills. This assertion, however, must be viewed in light of the fact that petitioner had originally agreed to a $4,800 settlement and later rejected a stipulation incorporating a $5,000 settlement. Also germane to this issue is the fact that the $5,000 settlement which would have been paid on or before January 1, 1973 was above the sum ultimately awarded in compensation after protracted hearings and appeals encompassing a two year period.

Accordingly, we will enter the following

ORDER

AND NOW, May 16, 1978 the order of the Workmen's Compensation Appeal Board, dated November 5, 1976 at Docket No. C.F. 2384, is affirmed and it is directed that judgment be entered in favor of Gerald J. Haas, Esquire and against the Estate of Samuel Lerner, Deceased and/or Sidney S. Lerner, M.D., in the sum of $1,460 plus interest at the rate of six per cent per year from January 1, 1973 until the date of payment.

(signed) _____

Roy Wilkinson, Jr., Judge

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[1] Act of June 2, 1915, P.L. 736. as amended, 77 P.S. Section 1 et seq. ( Hereinafter referred to as Act.)

[2] Respondent has not argued, nor do we find it necessary to decide, the issue of the retroactivity of Section 442 to injuries occurring prior to the effective date of the 1972 amendments.

PA. WORKMEN"S COMPENSATION APPEAL BOARD
Lerner v. Philadelphia Psychiatric Center, A69972
Opinion by Commissioner McCullough, Oct 2, 1975

Claimant was injured on January 9, 1970, which accidental injury was the subject of a compensation agreement entered into on February 20, 1970. The agreement recites that "while helping to subdue patient, Claimant was knocked down, striking head. Resulting in fracture right occipital skull, cerebral contusion with subarachnoid hemorrhage, lacerations of left eyebrow and left upper lip, and contusions of left side of face." Compensation at $60 a week was begun January 16, 1970. On July 29, 1970 the employer petitioned to terminate compensation on the basis claimant had recovered from his said injuries and could return to work on March 11, 1970. Claimant died on December 21, 1971. His brother, a medical doctor, was appointed administrator of his estate, and petitioned for the statutory burial expense on May 19, 1972. The said administrator petitioned to review the compensation agreement on December 11, 1973, asking for the payment of two medical bills, one for $90 and one for $20, for services to his late brother for the period January 9, 1970 to February 20, 1970. The referee consolidated the said three petitions, and after extensive hearing, did not grant the prayer of the petition to terminate, but continued compensation under the said agreement to October 7, 1971, as of which date he granted the termination petition. The referee also directed payment of the said two medical bills requested under the petition to review. The fatal claim petition was dismissed. The action of the referee was dated February 24, 1975. The carrier appealed, asserting that the referee should have granted its termination petition as of March 11, 1970. However, counsel for the

carrier has submitted a one-sentence brief which recites, "The findings of fact, conclusions of law, and award of Referee Stevenson dated February 24, 1975, were supported by sufficient competent evidence." Obviously, therefore, the carrier has withdrawn its appeal. The administrator appealed, asserting that there was no termination of disability on October 7, 1971.

On the petition to terminate, it is the burden of the employer to show a reduction or cessation of disability. Lackman vs. F.W.Woolworth Co., 205 Pa. Super. 129, 208 A.2d 33(1965). The employer presented two physicians in support of its petition. The one physician is Board certified in neurology and psychiatry. He first saw decedent on May 19, 1970. He received a history from decedent that he had been struck by an escaping patient and was rendered unconscious and hospitalized from January 9 to February 20,1970, when he voluntarily vacated the hospital. He stated decedent was supposed to have a skull fracture and contusion, but he knew there was a laceration of the head and an injury to the right eye. This physician stated decedent had had diabetes for ten years, and that the injury aggravated the diabetes, but thereafter the diabetes came under control. It was his opinion that the only thing significant from the accident was the temporary loss of control of the diabetes. This physician nowhere in his testimony mentioned the date of October 7, 1971.

The other physician presented by the defendant was Board certified in internal medicine, who never saw decedent, but who reviewed available medical records. He was posed a hypothetical question which embraced the medical history of decedent and was asked whether any disability in decedent, after April of 1970 was related to the blow on

the head suffered by the decedent on January 9, 1970. His answer was to the effect that disability subsequent to April of 1970, was not causally related to the then-claimant's cranial trauma. He was later asked whether the blow sustained by decedent on the head had any effect on the ongoing diabetes vascular disease of decedent, and his answer was he found no evidence linking the blow on the head with the vascular disease. The physician then opined that disability subsequent to April of 1970 was directly related to the diabetic vascular conditions of decedent. This physician nowhere in his testimony mentioned the date of October 7, 1971.

The testimony of the aforesaid two physicians comprises substantial competent evidence to support the termination of compensation. It is the function of the referee to pass upon the credibility of witnesses. Universal Cyclops Steel Corporation vs. Workmen's Compensation Appeal Board, 305 A.2d 75(1973). It can be seen from the testimony of these two physicians that compensation could have been terminated in April of 1970. The referee, however did not terminate compensation until October 7, 1971. But this board did not pass upon this extension by the referee of total disability compensation, because, as recited above, the one-sentence brief of counsel for the employer is tantamount to the withdraw(a)l of the appeal.

With regard to the petition to review the compensation agreement, which, in effect, was a request for the payment of services of two physicians, for $90, and $20, the appeal by the defendant, having been in effect withdrawn, these awards stand. They should stand, having been incurred during the first and second months of the disability from accident, in January of 1970.

It is the burden of the administrator in a petition for statutory burial expenses to prove that death was a result of the injury and that the injury was a cause of death. Hurlburt vs. Fidelity Window Clean Co., 192 Pa. Super. Ct., 152(1960).

An examination of the medical evidence offered by the administrator has not met said burden. In addition, finding of fact #7 of the referee recites that the administrator did not establish by competent evidence that the death was causally related to the work injury of January 9, 1970, and that the death resulted from a prior existing pathological disease not aggravated by the accidental injury. Since there is substantial competent evidence in the record to support this finding, we cannot disturb the denial of the petition for statutory burial expense.

The determination of the referee is therefore affirmed, in toto.

In addition to the above proceedings, the administrator, on March 25, 1975, mailed to this board a separate appeal asking for the awarding of costs for medical expenses, legal fees and disbursements, witness fees, notes of testimony, interest and penalties, etc. Since he did not present these matters to the referee, other than the matter concerning attorney fees, we cannot consider such separate appeal. Further, the administrator is proceeding under the 1972 amendments to the Pennsylvania Workmen's Compensation Act, and this board has consistently held that, with regard to accidents that occurred before said amendments, this board will not invoke the amendments as set forth in Section 435, and 440 under the act as amended.

On March 18, 1975, the administrator petitioned for a rehearing. There is no authority in the act for such a rehearing, because this board has just

now by this decision finally disposed of the appeals in the matter. The petition is therefore dismissed as being premature.

On April 8, 1975, the administrator petitioned for the allowance of witness fees. This petition cannot be considered by this board because this matter was not considered by the referee.

On April 8, 1975, the administrator filed a Document entitled "Claim Petition for Assessment of Costs." Again, since this was not presented to the referee, this board cannot consider this "Claim Petition for Assessment of Costs."

On April 8, 1975, the administrator also filed a Document entitled, "Petition for Allowance of Attorney Fees and Disbursements."

We have hereinabove stated that the imposition of counsel fees on an employer under the most recent amendments to the Pennsylvania Workmen's Compensation Act does not apply to this pre-amendment accident. Further, section 501 of the Pennsylvania Workmen's Compensation Act, as it stood at the time of the accident in this case, January 9, 1970, negates the validity of any counsel fee arrangement unless such an arrangement is approved by this board. Since there is no such approval in this case, the petition for allowance of attorney fees and disbursements must be dismissed. Richmond, Greenlee, Richmond Derrico & Posa vs. Workmen's Compensation Appeal Board, 16 Common. Ct. 594 (1975). (underlining supplied)

(signed)_____
Commissioner
Oct 2 1975

Concurred in by:

_____ (signed)
Chairman

_____ (signed)
Commissioner

PA. WORKMEN"S COMPENSATION APPEAL BOARD
Lerner v Philadelphia Psychiatric Ctr. C.F. 2384
Petition for Counsel Fee By Claimant's Counsel
Order by Commissioner McCullough Nov 5, 1976

McCullough, Commissioner:

Upon consideration of the petitioner of the former counsel of the estate of Samuel Lerner, deceased, under Section 501 of the Pennsylvania Workmen's Compensation Act, said estate and/or Sidney S. Lerner, M.D., is ordered to pay Gerald J. Haas, Esquire, the sum of $1,460.00 plus interest at the rate of 6% per annum from January 1, 1973 until the date of payment, as a counsel fee.

By the Board:

(signed) _____
Commissioner

(signed) _____
Chairman

(signed) _____
Commissioner

Nov 5,1976